



June 24, 2002

Mr. James T. Russell  
Administrative Assistant  
27<sup>th</sup> Judicial District of Texas, Bell County  
P.O. Box 540  
Belton, Texas 76513-0540

OR2002-3426

Dear Mr. Russell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164911.

The Bell County District Attorney's Office (the "district attorney") received a request for the district attorney's entire file in Cause No. 50,457. You state that some responsive information has been released to the requestor. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the system's obligations under section 552.301 of the Government Code. A governmental body wishing to withhold requested information must request an attorney general's decision no later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). You inform us that the requestor faxed a request on April 11, 2002 to an employee of the district attorney's office who was not the officer for public information. Generally, a request for information need not name the Public Information Act or be addressed to the officer for public information. *See* Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974). However, a request made by electronic mail or facsimile transmission must be addressed to the officer for public information or the officer's designee. Gov't Code § 552.301(c). You state that the district attorney received a second request by mail on April 16, 2002. The deadline for submitting a request for a decision from this office was April 30, 2002. You submitted your request for a decision on

April 24th; accordingly, we conclude that you did timely request a decision from this office pursuant to section 552.301 of the Government Code.

We note that the information at issue constitutes completed investigations made of, for, or by the district attorney. Thus, section 552.022(a)(1) of the Government Code provides that this information is not excepted from required disclosure under the Public Information Act, except as provided by section 552.108, or unless the information is expressly confidential under other law. *See Gov't Code § 552.022(a)*. You contend that section 552.103 of the Government Code makes the submitted information in Tab 5 confidential. However, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). You make no other arguments against disclosure of this information, nor are we aware of any other law that would make it confidential. Thus, the submitted records in Tab 5 must be released to the requestor. Because you argue that sections 552.101, 552.108, and 552.130 except portions of the remaining submitted information from public disclosure, we address those claims.

The submitted records contain information the release of which is governed by chapter 611 of the Health and Safety Code. Section 611.002 of the Health and Safety Code applies to "[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." *See also* Health and Safety Code § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the documents that are mental health records that are confidential under section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health and Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

You claim that section 552.101 excepts a portion of the submitted information from public disclosure. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov't Code § 411.083*.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See Open Records Decision No. 565 (1990).* Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. A portion of the information submitted for our review is CHRI generated by TCIC and NCIC. Accordingly, the information that we have marked is excepted from required public disclosure by section 552.101 of the Government Code as CHRI.

Sections 411.192 and 411.193 of the Government Code govern the release of all information maintained by the Department of Public Safety concerning the licensure of individuals to carry a concealed handgun. Section 411.192 provides:

The department shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. The department shall, on written request and payment of a reasonable fee to cover costs of copying, disclose to any other individual whether a named individual or any individual whose full name is listed on a specified written list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, and zip code. *Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552, Government Code,* except that the applicant or license holder may be furnished a copy of disclosable records on request and the payment of a reasonable fee. The department shall notify a license holder of any request that is made for information relating to the license holder under this section and provide the name of the person or agency making the request. This section does not prohibit the department from making public and distributing to the public at no cost lists of individuals who are certified as qualified handgun instructors by the department.

Gov't Code § 411.192 (emphasis added). Section 411.193 further states:

The department shall make available, on request and payment of a reasonable fee to cover costs of copying, a statistical report that includes the number of licenses issued, denied, revoked, or suspended by the department during the

preceding month, listed by age, gender, race, and zip code of the applicant or license holder.

Gov't Code § 411.193. We have marked the information that is confidential under section 411.192 of the Government Code. In addition, we find that the circumstances of this request do not meet the access requirements of that section. Accordingly, the marked information must be withheld under section 552.101 of the Government Code.

You claim that a portion of the requested information is excepted from disclosure pursuant to section 552.101 in conjunction with section 559.003 of the Government Code. Sections 559.001, 559.002, and 559.003 provide:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
  - (A) the individual consents to the disclosure;
  - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
  - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 559.001, .002, .003. Section 559.002 does not appear to permit the disclosure of the submitted fingerprint information to the requestor. Therefore, we conclude that the district attorney must withhold the fingerprint information that you have marked from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 559.003 of the Government Code.

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We have marked the information that the district attorney must withhold under common-law privacy as encompassed by section 552.101 of the Government Code. See *id.*

You claim that the submitted information in Tab 3 is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides in relevant part:

(B) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation[.]

Gov't Code § 552.108(b)(3)(A). A governmental body that raises an exception to disclosure under section 552.108 must reasonably explain, if the requested information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. See Gov't Code § 552.301(a)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You represent to this office that the records

submitted in Tab 3 were prepared at the direction of the district attorney for internal use as part of the district attorney's case. Based on your representation and our review of the records in question, we conclude that the records in Tab 3 may be withheld from the requestor under section 552.108(b)(3).

The submitted records in Tab 6 contain motor vehicle information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

The district attorney must withhold Texas driver's license numbers and license plate numbers under section 552.130.

The submitted records in Tab 6 also include social security numbers. A social security number or "related record" also may be confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You do not inform us that the social security numbers in the submitted records were obtained and maintained pursuant to any provision of law enacted on or after October 1, 1990. We therefore have no basis for concluding that any of the social security numbers in the requested records are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

In summary, we have marked the records that the district attorney may release only in accordance with the access provisions of chapter 611 of the Health & Safety Code. Under section 552.101, the district attorney must withhold CHRI, information maintained by the Department of Public Safety concerning the licensure of individuals to carry a concealed handgun, fingerprint information, and information that we have marked as private. The records in Tab 3 may be withheld from the requestor under section 552.108(b)(3). The

district attorney must withhold Texas driver's license numbers and license plate numbers under section 552.130. Social security numbers may be confidential under federal law. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 164911

Enc. Submitted documents

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(w/o enclosures)